

of a commission of 5 per cent. on the amount due upon the first sale, as a compensation for his services as solicitor, the trustee being the solicitor conducting the cause.

The first purchaser being in default, proceedings were instituted against him for a re-sale, under the Act of 1841, ch. 216; and a re-sale at his risk being ordered, the Court in ratifying the second sale by an order passed on the 30th of January, 1850, in addition to the commission allowed the trustee according to the course of the Court, directed that he should be allowed a commission of 5 per cent. on the amount due upon the first sale, when collected "as compensation for his services as solicitor."

It has been the constant habit of the Court, when its trustees employed to sell property are compelled to bring suit to enforce the payment of the purchase-money, to allow a commission of 5 per cent. to the attorney engaged by them; and when the trustee is himself an attorney, and collects the money in that capacity by proceedings at law, a similar allowance has always been made to him. *Post vs. Mackall*, 3 *Bland*, 528, 529. And this commission is always deducted from the proceeds of sale, as is the trustee's commission as such, and the costs of suit before the distribution is made among the creditors; the effect of which is, of course, to throw it upon the unpreferred creditors when the fund is insufficient to pay all. This being the case, the Auditor was quite right in his account B, in adding it to the amount due from the first purchaser to the trustee and deducting the aggregate from the proceeds of the second sale, as otherwise the burden would have been thrown upon the creditor having a preferred claim to be paid out of the fund.

The order of the 30th of January, 1850, was passed upon the assumption, that the proceeding instituted by the trustee in this case, to collect the money by a re-sale, is sufficiently analogous to proceedings at law, instituted for the same purpose, to justify the same allowance. It follows, therefore, that the exceptions taken by the first purchaser to the allowance of this commission must be overruled.